

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

RESTORE PUBLIC TRUST,)	
)	
Plaintiff,)	
)	
v.)	Case No. <u>1:19-cv-01371</u>
)	
UNITED STATES DEPARTMENT OF)	
COMMERCE,)	
)	
)	
Defendant.)	

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

1. This is an action under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, as amended, as well as agency FOIA regulations, 15 C.F.R. §§ 4.1 *et seq.*, challenging the failure of the United States Department of Commerce ("Commerce") to fulfill the requests for information made by Restore Public Trust.

2. Plaintiff seeks declaratory relief that defendant is in violation of the FOIA for failing to fulfill plaintiff's requests for records, and injunctive relief that defendant immediately and fully comply with plaintiff's requests under the FOIA.

JURISDICTION AND VENUE

3. This Court has both subject matter jurisdiction over this action and personal jurisdiction over the parties pursuant to 5 U.S.C. § 552(a)(4)(B) and 5 U.S.C. § 702, which gives the Court jurisdiction over agency actions where an aggrieved party has suffered a wrong within the meaning of a "relevant statute," here the FOIA. This Court also has jurisdiction over this action pursuant to 28 U.S.C. § 1331. Venue lies in this District under 5 U.S.C. § 703, 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1391(e)(1).

4. Plaintiff Restore Public Trust is a public interest organization that promotes accountability and transparency in government to root out corruption and malfeasance. It is designed to serve as a critical resource for policymakers and elected officials investigating public corruption, members of the public looking for more information about what their government is or is not doing, and journalists examining the alleged malfeasance of government officials. It uses the information it gathers, and its analysis of that information, to educate the public through reports, press releases and other media. Restore Public Trust also makes the material it gathers available on its public website.

5. Defendant Commerce is an agency within the meaning of 5 U.S.C. § 552(f). Defendant is the federal agency with possession and control of the records responsive to plaintiff's requests and is responsible for fulfilling the FOIA requests of plaintiff.

STATUTORY FRAMEWORK

The Freedom of Information Act

6. The FOIA, 5 U.S.C. § 552, requires agencies of the federal government to release requested records to the public unless one or more specific statutory exemptions apply.

7. An agency must respond to a party making a FOIA request within 20 working days, notifying that party of at least the agency's determination whether to fulfill the request, and of the requester's right to appeal the agency's determination to the agency head. 5 U.S.C. § 552(a)(6)(A)(i).

8. In "unusual circumstances," an agency may delay its response to a FOIA request but must provide written notice to the requesting party and must also provide "the date on which a determination is expected to be dispatched." 5 U.S.C. § 552(a)(6)(B).

9. This Court has jurisdiction, upon receipt of a complaint, “to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant.” 5 U.S.C. § 552(a)(4)(B).

10. The FOIA provides a mechanism for disciplinary action against agency officials who have acted inappropriately in withholding records. Specifically, when requiring the release of improperly withheld records, if the court makes a written finding that “the circumstances surrounding the withholding raise questions whether agency personnel acted arbitrarily or capriciously,” a disciplinary investigation is triggered. 5 U.S.C. § 552(a)(4)(F).

11. Commerce has FOIA regulations mandating its requirements to respond to FOIA requests. 15 C.F.R. §§ 4.1 *et. seq.*

FACTS GIVING RISE TO PLAINTIFF'S CLAIMS FOR RELIEF

12. This case concerns three requests for records relating to the decision of the Secretary of Commerce to include a question concerning citizenship in the upcoming 2020 United States Census. After Commerce Secretary Wilbur Ross testified on the issue before Congress, questions arose concerning whether he had made misleading statements about the decision to include the citizenship question. *See, e.g.,* Ariane de Vogue, Gregory Wallace and Paul LeBlanc, “Justice Department filing appears to contradict commerce secretary testimony to Congress,” *CNN*, 10/12/18. In addition, an individual who met with Wilbur Ross about the 2020 Census recently claimed that Ross mischaracterized her views about the addition in a memo announcing the policy change. *See* Erik Larson, “Ross Accused of Twisting Expert’s View on Citizenship Question,” *Bloomberg*, 11/07/18.

13. Given the questions surrounding the credibility of Secretary Ross, there is a strong public interest in learning the full extent of how the decision to include the citizenship

question in the 2020 Census was made, and in determining whether the Secretary has been honest with Congress and the American public.

The First Request

14. On December 4, 2018, plaintiff submitted by email a FOIA request to the Office of the Secretary Freedom of Information Officer, Department of Commerce. A copy of this request is attached as Exhibit 1. The request sought “all emails sent by, to or carbon copying (‘CC’) the following officials from March 23, 2018 and March 26, 2018”:

- Wilbur Ross
- Wendy Teramoto
- Karen Dunn Kelley
- Earl Comstock
- Dr. Ron Jarmin
- John Guido.

15. Plaintiff sought a fee waiver, explaining that the request was made in the public interest. It explained that questions concerning the credibility of Secretary Ross highlighted the public interest in how the decision to include the citizenship question in the 2020 Census was made, and that the requested materials would be used to inform the public. Plaintiff also explained that its request for records is “primarily and fundamentally for non-commercial purposes,” as it is a 501(c)(3) nonprofit organization with no financial interest in the records and will use them to inform the public.

16. As of the date of the filing of this Complaint, plaintiff has received no communications from defendant concerning this request.

The Second Request

17. On December 4, 2018, plaintiff submitted by email a second FOIA request to the Office of the Secretary Freedom of Information Officer, Department of Commerce. A copy of this request is attached as Exhibit 2. The request sought “all emails referencing Christine Pierce or the Nielsen Company sent by, to, or carbon copying (‘CC’) the following officials, or individuals acting on their behalf”:

- Wilbur Ross
- Wendy Teramoto
- Karen Dunn Kelley
- Earl Comstock
- John Guido
- Dr. Ron Jarmin
- Peter Davidson
- Kris Kobach
- John Gore.

18. Plaintiff sought a fee waiver, explaining that the request was made in the public interest. It explained that questions concerning the credibility of Secretary Ross highlighted the public interest in how the decision to include the citizenship question in the 2020 Census was made, and that the requested materials would be used to inform the public. Plaintiff also explained that its request for records is “primarily and fundamentally for non-commercial purposes,” as it is a 501(c)(3) nonprofit organization with no financial interest in the records and will use them to inform the public.

19. As of the date of the filing of this Complaint, plaintiff has received no communications from defendant concerning this request.

The Third Request

20. By letter dated April 12, 2019, plaintiff submitted a FOIA request to the Office of the Secretary Freedom of Information Officer, Department of Commerce. A copy of this request is attached as Exhibit 3. The request sought “all correspondence concerning the 2020 census, sent by or to the following officials, between March 1, 2018 and March 26, 2018”:

- Wilbur Ross
- Wendy Teramoto
- Karen Dunn Kelley
- Earl Comstock
- Dr. Ron Jarmin
- John Guido.

21. Plaintiff also sought a fee waiver, explaining that the request was made in the public interest. It explained that questions concerning the credibility of Secretary Ross highlighted the public interest in how the decision to include the citizenship question in the 2020 Census was made, and that the requested materials would be used to inform the public. Plaintiff also explained that its request for records is “primarily and fundamentally for non-commercial purposes,” as it is a 501(c)(3) nonprofit organization with no financial interest in the records and will use them to inform the public.

22. As of the date of the filing of this Complaint, plaintiff has received no communications from defendant concerning this request.

PLAINTIFF'S CLAIMS FOR RELIEF

CLAIM ONE

(Failure to Conduct an Adequate Search)

23. Plaintiff re-alleges and incorporates by reference all preceding paragraphs.

24. Plaintiff submitted requests that reasonably described the records sought and were made in accordance with Commerce's published rules.

25. In response, defendant has failed to conduct a search reasonably calculated to uncover all responsive agency records.

26. Therefore, defendant has violated the FOIA's mandate to search for responsive records. 5 U.S.C. § 552(a)(3)(C).

27. Plaintiff is entitled to injunctive and declaratory relief with respect to the search for the requested records.

CLAIM TWO

(Failure to Produce Records Under the FOIA)

28. Plaintiff re-alleges and incorporates by reference all preceding paragraphs.

29. Plaintiff properly asked for records within defendant's control.

30. Plaintiff is entitled by law access to the records requested under the FOIA, unless defendant makes an explicit and justified statutory exemption claim.

31. Defendant has not produced the records responsive to plaintiff's FOIA requests.

32. Therefore, defendant has violated the FOIA's mandate to release agency records to the public by failing to release the records as plaintiff specifically requested. 5 U.S.C. §§ 552(a)(3)(A).

CLAIM THREE

(Failure to Provide Fee Waiver)

33. Plaintiff re-alleges and incorporates by reference all preceding paragraphs.

34. Plaintiff properly asked for a public interest fee waiver.

35. Plaintiff is entitled by law to receive a public interest fee waiver. Restore Public Trust is a nonprofit organization dedicated to informing the public regarding issues of public concern. The addition of the citizenship question in the 2020 Census is a matter of significant public concern. The issue has generated substantial media, public, and congressional interest. Moreover, questions have arisen concerning how the decision to include the citizenship question was made, and whether the Secretary of Commerce made misleading statements about the decision-making process to Congress and the public. Plaintiff has no commercial interest in the information and will use it solely to inform the public.

36. Defendant did not provide a public interest fee waiver to plaintiff.

37. Therefore, defendant has violated the FOIA's mandate to grant fee waivers when the requests are made in the public interest. 5 U.S.C. §§ 552(a)(4)(A)(iii) and 15 CFR § 4.11(l).

PRAYER FOR RELIEF

WHEREFORE, plaintiff respectfully requests that this Court:

1. Declare that defendant has violated the FOIA and agency regulations by failing to conduct an adequate search for records responsive to plaintiff's FOIA requests;

2. Order the defendant to immediately conduct and document an adequate search for responsive records as dictated by plaintiff's requests;

3. Declare that the defendant has violated the FOIA by failing to lawfully satisfy plaintiff's FOIA requests;

4. Order the defendant to release all records responsive to plaintiff's FOIA requests;
5. Order the defendant to grant a public interest fee waiver for all records responsive to plaintiff's requests;
6. Award plaintiff its reasonable attorney fees and litigation costs in this action, pursuant to 5 U.S.C. § 552(a)(4)(E); and
7. Grant such other and further relief as the Court may deem just and proper.

Respectfully submitted,

By: /s/ Jonathan Massey

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